



---

GW Law Faculty Publications & Other Works

Faculty Scholarship

---

2000

## True Reparations

W. Burlette Carter

*George Washington University Law School, [bcarter@law.gwu.edu](mailto:bcarter@law.gwu.edu)*

Follow this and additional works at: [https://scholarship.law.gwu.edu/faculty\\_publications](https://scholarship.law.gwu.edu/faculty_publications)



Part of the [Law Commons](#)

---

### Recommended Citation

W. Burlette Carter, True Reparations, 68 Geo. Wash. L. Rev. 1021 (2000).

This Article is brought to you for free and open access by the Faculty Scholarship at Scholarly Commons. It has been accepted for inclusion in GW Law Faculty Publications & Other Works by an authorized administrator of Scholarly Commons. For more information, please contact [spagel@law.gwu.edu](mailto:spagel@law.gwu.edu).

# THE GEORGE WASHINGTON LAW REVIEW

---

TRUE REPARATIONS

W. BURLETTE CARTER



VOLUME 68

NUMBERS 5/6

JULY/SEPTEMBER 2000

# True Reparations

W. Burlette Carter\*

Not surprisingly, Professor Anthony Cook delivers a provocative piece, one that follows the tradition of his other scholarship illuminating the world of Dr. Martin Luther King, Jr. He also joins a number of notable African American commentators, including U.S. Representative John Conyers and Randall Robinson, President of TransAfrica, in advocating economic reparations to compensate for historical race-based discrimination against blacks.<sup>1</sup> Professor Cook contributes to this debate by expressly linking reparations to King's quest for "the beloved community." He resurrects for us a King rarely seen in the majority press, one who supported reparations for wages unpaid during slavery. Professor Cook joins in the call for reparations by offering a theoretical model that focuses upon national legislation that would finance a reparations scheme to benefit those disproportionately represented among the poor—groups that have suffered documented, historical discrimination. Most significantly, perhaps, he argues that only public atonement that is buttressed by economic restitution can create a needed reconciliation between whites and blacks.<sup>2</sup> As I interpret the article, three steps are essential to healing the wounds between blacks and whites: first, confession; second, restoration; and third, reconciliation.<sup>3</sup> Using this discourse of public

---

\* Professor of Law, The George Washington University Law School. Some of the thoughts expressed herein, particularly those on racial group dynamics, are also noted in my article, *What's Love Got to Do With It? Race Relations and the Second Great Commandment*, to appear in *CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT* (Angela Carmella et al., eds., Yale 2001).

<sup>1</sup> See, e.g., *The Case for Reparations: Why, How Much, When?*, EBONY, Aug. 2000, at 72 (including essays by Rep. Conyers and Randall Robinson). In every Congress since 1989 Representative Conyers has sponsored a bill, H.R. 40, calling for Congressional inquiry into the viability of reparations. See H.R. 40, 107th Cong. (2001); see also RANDALL ROBINSON, *THE DEBT: WHAT AMERICA OWES TO BLACKS* (2000). Legal scholars have also addressed the question of reparations for African Americans. See, e.g., Adrienne D. Davis, *The Case for United States Reparations to African Americans*, 7 HUM. RTS. BRIEF 3 (2000); Rhonda V. Magee, Note, *The Master's Tools, From the Bottom Up: Responses to African American Reparations Theory in Mainstream and Outsider Remedies Discourse*, 79 VA. L. REV. 863 (1993); Vincene Verdun, *If the Shoe Fits, Wear it: An Analysis of Reparations to African Americans*, 67 TUL. L. REV. 597 (1993); Robert Westley, *Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?* 40 B.C. L. REV. 429 (1998). For a broader discussion of reparations in this and other contexts see, e.g., Saul Levmore, *Changes, Anticipations, and Reparations*, 99 COLUM. L. REV. 1657 (1999) (arguing that reparations paid shortly after misconduct occurs should alter laws so as to lower the likelihood of payment of future reparations; in contrast, compensation paid long after the wrongdoing has ended—as was the case for Japanese American internee reparations—is largely a political matter unlikely to encourage anticipatory behavior and best analyzed in terms of interest group power); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987); Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims*, 40 B.C. L. REV. 471 (1998) (discussing federally approved reparations for unjustly incarcerated Japanese Americans and comparing their reparations struggle to that of African Americans).

<sup>2</sup> See Cook, *supra*, text accompanying notes 9-10.

<sup>3</sup> See *id.*

atonement, Professor Cook hopes to provide the spiritual foundation he believes is needed for the ongoing reparations debate.

Surely, Professor Cook's reparations argument has value as a conscience call to heirs to the social and economic bounties of racial discrimination. As I have argued elsewhere, the economic benefits of slavery and discrimination include reduced competition and cheap or free labor.<sup>4</sup> Others have pointed out that, because of our history of racial exclusion, being white alone provides a modern social and economic benefit. Indeed, it has been said that one key result of slavery and race discrimination was to make whiteness itself a property right.<sup>5</sup> Professor Cook's charge of character assassination—that the King who supported reparations has been buried in favor of a milder King who presented 'colorblind' approaches—is a powerful critique of our culture that deserves serious consideration. His reparations plan is provocative and innovative. But as I will argue here, one must question the practical value of a reparations approach as a strategy to be relied upon by the community of victims. As Professor Cook himself acknowledges, economic reparations do not and cannot address the root problem that lies at the heart of our nation's difficulties with black/white race relations. Furthermore, I fear that to make economic reparations possible blacks will be required to make political tradeoffs that will make the ultimate achievement of any compensation not worth the battle. If reconciliation is the goal, I would venture that the essential ingredient is not compensation, but rather identification of and divestiture of the privileges that racial supremacy regimes provide to whites—in essence, the divestiture of whiteness as property. Professor Cook's model, while acknowledging these problems, falls short of addressing them. Finally, Professor Cook's analysis does not confront the unfortunate fact that most of those responsible for implementing a reparations plan may not desire a beloved community; indeed, a less than beloved community serves some economic purposes to a higher degree because it supports the division of society into classes. Thus, while I believe that the reparations debate, both in the form that Professor Cook presents it in and as it appears elsewhere, is in general useful, I also believe that blacks should not view seeking political economic reparations as a strategy into which their energies ought to be channeled wholesale. Debating reparations is an interesting intellectual discussion, but at the end of the day, it offers few practical solutions to the dilemma of racial injustice in America.

It is, sadly, important for me to note at the onset the perspective I bring to Professor Cook's piece. I am an African American; my ancestors were victims of American slavery. Racism assured that my grandparents were

---

<sup>4</sup> See W. Burlette Carter, *Reconstructing Langdell*, 32 GA. L. REV. 1, 133 (1997).

<sup>5</sup> See Derrick A. Bell, *Property Rights in Whiteness—Their Legacy, Their Economic Costs*, in CRITICAL RACE THEORY, THE CUTTING EDGE at 75-83 (1995); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1710-11 (1997) (expanding upon Bell's description). White writers have also written on the related topic of whiteness as privilege. See BARBARA J. FLAGG, *WAS BLIND BUT NOW I SEE: WHITE RACE CONSCIOUSNESS AND THE LAW* (1998); RUTH FRANKENBERG, *WHITE WOMEN, RACE MATTERS: THE SOCIAL CONSTRUCTION OF WHITENESS* (1993); GEORGE LIPSITZ, *THE POSSESSIVE INVESTMENT IN WHITENESS: HOW WHITE PEOPLE PROFIT FROM IDENTITY POLITICS* (1998); STEPHANIE M. WILDMAN, *PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA* (1996).

functionally illiterate. It may surprise some to hear that my generation, born in the early sixties on the border of the baby boom, experienced the last gasps of formal segregation in public school and public accommodations in the late '60s and early '70s. Thus, I attended segregated schools during part of my elementary years and have childhood memories of vacations with my family at Hilton Head Island's then-segregated beaches. Were I asked whether I suffer from race discrimination today, I would answer "yes," although, I would concede, not nearly as much as did my foreparents in their day. I say all of this to acknowledge that I would be a person who, presumably, would benefit from any black racial reparations proposal. By contrast, I suspect that most readers of this piece will examine the issue of reparations from a very different perspective: as those who might have to pay if reparations were granted, or as those who would lose the tremendous economic benefits that group-based discrimination always bestows upon the privileged classes. Their families benefited from the reduced competition that resulted when racism excluded mine; their families secured the cheap or free labor that resulted when racism denied mine education.

Professor Cook focuses his attention, as perhaps he must, upon this primary audience of beneficiaries. He asks: "What can the beneficiaries of the injury do to bring us closer to the beloved community?"<sup>6</sup> He answers: "They must confess and act to restore those they have harmed through the payment of reparations." There is, of course, another question that he does not directly address—"Is the call for reparations a viable strategy *from the standpoint of the victims?*" I understand that Professor Cook could not cover all bases in his article, but in my role as commentator, I feel compelled to offer that second question for consideration as well. To examine the question of victim reliance upon 'reparations talk,' I will discuss the practical difficulties presented by a politically-oriented economic reparations strategy, considering the three elements of Professor Cook's model for achieving the beloved community in turn: confession, restoration, and reconciliation.

*I. The Barriers to Confession: Few Whites Perceive the Extent of Today's Racial Impasse or the Economic Benefits They Have Received from Slavery and Race Discrimination.*

Professor Cook opines that, where black/white race relations are concerned, America needs a true confession of the harms done in the name of white supremacy. It is true, of course, that confessions have come and gone. In 1998, while traveling through Africa, President Clinton expressed "regret" over American slavery.<sup>7</sup> In 1995, the Southern Baptist Convention issued a formal apology for its role in supporting slavery.<sup>8</sup> There have been other

---

<sup>6</sup> Cook notes that reconciliation can only come through an act of public atonement that entails a process of confession and restitution.

<sup>7</sup> See, e.g., James Bennet, *Clinton in Africa: The Overview; In Uganda, Clinton Expresses Regret On Slavery in U.S.*, N.Y. TIMES, Mar. 25, 1998, at A1.

<sup>8</sup> See, e.g., Jeannine Lee, *Southern Baptists Offer an Apology*, U.S.A. TODAY, June 21, 1995, at 5A.

similar apologies. But, presumably, Professor Cook seeks something more, a mass confession that can support a viable political movement toward reparations.

At this juncture, it seems reasonable to ask an important question: "*Why hasn't widespread confession already happened?*" Surely slavery and state-sanctioned segregation are both well-documented atrocities. Professor Cook indirectly deals with this question when he discusses the social fears that have kept whites from acknowledging responsibility for injustices against blacks.<sup>9</sup> Thus, he speaks of fears of disunion, fears of black competition, fears of black retaliation, and fears of public humiliation.<sup>10</sup> He is correct on these issues, but I would go further.

In his reference to an "impasse" in racial relations, Professor Cook seems to suggest that whites recognize that something is wrong with the current state of affairs between blacks and whites. I agree that there is an impasse, but many whites do not see it. This fact raises grave difficulties for Professor Cook's first requirement of confession.

As members of a large numerical majority, whites are often clueless about the ways that merely being white benefits them every day. Though thoughtful attention is increasingly being devoted to this subject by both white and black writers, it remains true that across economic and educational lines, whites hesitate to accept that race affects either their life choices or their value judgments. Instead, more often than not, whites view themselves as objective actors, unaffected by considerations of race. Thus, Barbara Flagg has noted that "[t]he most striking characteristic of whites' consciousness of whiteness is that most of the time we don't have any" and that for most whites "to speak or think of race is to speak or think about people of color."<sup>11</sup> Flagg calls this ability of whites to ignore their own whiteness the "transparency phenomenon."<sup>12</sup> Arguably, this tendency to view whiteness as insignificant in white lives arises out of at least two facts. First, whites often lack any experience to affirm allegations that race matters because they do not move in circles in which differentiations based upon race are apparent to them. If everyone in the relevant circle is white, then everyone receives the benefit of whiteness. There, no discrimination based upon race occurs. Second, many whites emotionally reject the idea that they could be thinking in such a way that elevates whiteness, even unconsciously, over other equally artificial states of being. Understandably, they also resist acknowledging that they receive valuable benefits because others do think in such a way.

Lacking much personal experience to confirm the significance of race in America, many whites conclude that all is well. When blacks offer contrary views based upon their own daily lives, black experiences (though suspiciously consistent) seem not enough. Implicit in the rejections of the stories of black lives (and the easier acceptance of the majority stories as the racial

---

<sup>9</sup> See Cook, *supra*, text accompanying notes 56-63.

<sup>10</sup> See *id.*

<sup>11</sup> FLAGG, *supra* note 5, at 1-2. Flagg's book is based upon her article, "*Was Blind, But Now I See*": *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 969 (1993).

<sup>12</sup> See *id.*

norm) is a discounting of black voices, one that implies that minority voices—black voices—may be given less weight because they are in the minority, and even that black voices are somehow not trustworthy or credible on the subject of race relations.

This disconnect between whites and blacks is not accidental but a direct result of our history of racism. It also likely flows from the human tendency to objectify our own respective experiences absent broad exposure to other experiences. As sociologist Gordon Allport has pointed out, people are instinctively self-centered.<sup>13</sup> Under normal circumstances, we—all of us—love, value and seek out those things that are like us.<sup>14</sup> This tendency to flock together with our own kind can create isolation which, in turn, can lead to prejudicial thinking about those outside of groups. Additionally, each group develops for its own convenience unique ways of conducting itself that define the norms for that group. As a result, not only do imagined differences arise between groups, real differences also arise.<sup>15</sup> Majority groups, by their sheer numbers, are uniquely able to insulate themselves and to convince themselves that their view, their culture, their norms are the only objective ones, thus ensuring that their subjective reality shapes the objective standard by which every other experience is measured.<sup>16</sup> Even more importantly, prejudice in favor of that with which one is most comfortable,<sup>17</sup> reinforces the isolation of the excluded class, posing barriers to their participation in public discourse—written and oral—that forms the policies that govern everyone and create the common understandings from which future discourse and policymaking proceeds. In the academic arena, this clash of perspectives is clearly evidenced in the debates over the legitimacy of critical race theory and other writings that incorporate minority perspectives.<sup>18</sup>

---

<sup>13</sup> See generally GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* 29-47 (1954) (discussing the formation of in-groups).

<sup>14</sup> See *id.* at 17-19.

<sup>15</sup> See *id.* at 19 (noting that separation into groups may lead to genuine conflicts of interest, not merely imaginary ones).

<sup>16</sup> Compare Richard Delgado's comments on the dominant narrative, *infra* note 22.

<sup>17</sup> Allport notes that one can be prejudiced in favor of something as well as prejudiced against something. See ALLPORT, *supra* note 13, at 6.

<sup>18</sup> A seminal article that helped to jumpstart the critical race theory ("CRT") movement is Richard Delgado's *The Imperial Scholar*, in which Delgado accused white writers of ignoring minority perspectives and essentially perpetuating a civil rights agenda that excluded minority viewpoints. See Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561, 566-73 (1984). Since the movement's beginnings, critical race theorists have complained that their writing is not as well-received in the academy as mainstream writing because CRT does not embrace traditional ways of thinking acceptable to white America. When Randall Kennedy (an African-American whose work on race is closer to the mainstream reflected in civil rights scholarship by whites) argued in *Racial Critiques of Legal Academics*, 102 HARV. L. REV. 1745 (1989), that critical race theory was not gaining acceptance among whites because it was not thorough or scientific, his comments touched off a public firestorm reflecting discontents that had been festering in the academy for some time. Many law review articles deal purely with the question of critical race theory's legitimacy. See, e.g., *Colloquy: Responses to Randall Kennedy's Racial Critiques of Legal Academia*, 103 HARV. L. REV. 1844 (1990). See also Delgado, *Brewer's Plea: Critical Thoughts on Common Cause*, 44 VAND. L. REV. 1 (1991), which in addition to rejecting the pleas for a common ground approach, provides a useful history of the debate over critical race theory. Among white writers, the more

Sadly, then, the personal experience that serves as the baseline for everyday conversations about race in America is very different for whites than it is for blacks.<sup>19</sup> It is exceedingly difficult for one to confess when one does not acknowledge that there has been—and continues to be—transgression.

Confession advocates face another problem. Many white Americans resist any suggestion that they bear any personal responsibility for restoring to blacks what was lost through slavery or its aftermath.<sup>20</sup> For them, slavery is a thing of the long-ago past. As for segregation, that too, in many white minds, is a dinosaur, its bones long buried, its former life having no significant impact on today. They seem to think that once the Supreme Court issued the final *Brown v. Board of Education*<sup>21</sup> decision, a loud trumpet sounded and people and governments suddenly stopped discriminating and segregating. These advocates find it surprising to hear that state-sanctioned racial discrimination continued well into the seventies in many parts of our nation. They find it difficult to accept that even today white privilege exists. Isolation breeds ignorance, but so too, the exclusion of blacks from those institutions that conduct our nation's storytelling—schools, colleges and universities, media outlets—has not helped.

Certainly, all is not lost. As noted previously, there are whites who are working in ways big and small to change America's nonchalant attitude towards the existence of white privilege. But this thinking has not made much headway into the mainstream—and this is true across the educational spectrum. In the legal academy, with the exception of the small corner of writings that openly claim race or civil rights as its subject, the majority of mainstream writing continues to proceed from the assumption that the audience is a

---

recent vocal critics of CRT have included Judge Richard A. Posner and Professors Daniel Farber and Suzanna Sherry. See DANIEL A. FARBER & SUZANNA SHERRY, *BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW* (1997); RICHARD POSNER, *OVERCOMING LAW* (1995) (discussing in Chapter 18 "Nuance, Narrative, and Empathy in Critical Race Theory"). For one of numerous responses to such attacks, see Jerome McCristal Culp, *To the Bone: Race and White Privilege*, 83 MINN. L. REV. 1637 (1999) (addressing Farber and Sherry's critiques, as they overlap with others' critiques). Similarly, critical race theorists have claimed that, as did Delgado in *The Imperial Scholar* in 1984, contemporary black writers who are willing to take on CRT and accept traditional approaches agreeable to whites have been celebrated in white scholarship, while black writers who argue for alternative views are far less frequently cited and certainly not celebrated. See, e.g., Richard Delgado, *The Imperial Scholar Revisited: How to Marginalize Outsider Writing, Ten Years Later*, 140 U. PA. L. REV. 1349 (1992). The debate over the legitimacy of critical race theory is but one example of a larger disconnect between black and white perspectives. (It is also important to note that not all African American writers, even those swimming against the mainstream tide, would label themselves members of the CRT movement.)

<sup>19</sup> See ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* (1992).

<sup>20</sup> See, e.g., Clarence Page, *Why not an Apology for Slavery?* AUSTIN AMERICAN-STATESMAN, Apr. 2, 1998, at A15 (noting the hostile reactions to President Clinton's expression of regret for slavery while on Africa trip and, therefore, recanting his earlier view that the apology alone would not mean much).

<sup>21</sup> *Brown v. Board of Educ.* ("Brown II"), 349 U.S. 294 (1955). *Brown v. Board of Educ.* ("Brown I"), 347 U.S. 483 (1954), determined that racial segregation in public schools was unconstitutional. *Brown II* addressed the question of remedy and ordered school authorities to fashion local remedies to accomplish desegregation.



white audience, that the world that the writer addresses is a white world, with all the attendant privileges of whiteness. Thus, the job of fashioning remedies for those who lack the privilege of whiteness is largely left to those who lack the privilege. So proceeding, whites establish a crucial value in whiteness—the right to infuse one’s communications with one’s particular racial perspective, and to have one’s communications, so fashioned, accepted in the mainstream as completely objective and independent of racial considerations.<sup>22</sup> This is the transparency phenomenon at work.<sup>23</sup>

Professor Cook rightly asserts that true confession must be sincere and not mere words.<sup>24</sup> Confession requires an appreciation and acknowledgement of the depth of the transgression and of the hurt that one’s action or inaction, intentional or unintentional, has caused. Having little exposure to black life, many whites have no true reference point for the transgression against blacks, or for the hurt blacks have felt and feel. Surely, it can also be argued that any white ignorance is intentional and that confession requires a commitment to self-education about other groups’ lives. But even the decision to educate oneself requires acknowledgement that one actually has a deficit in knowledge, that one has something valuable to learn. While whites may acknowledge that there are, in general, alternative ways of looking at the world, many do not seem to acknowledge that their own experiences, and the norms they arrive at because of them, may be less than objective, and may even be unfair when applied to those who do not share whiteness with them.

I believe that the reparations debate can serve the useful purpose of educating whites about the lives of blacks and about how those lives differ from white lives. By asking for compensation, one claims that something very valuable has been wrongfully taken, thus rebutting assumptions that one lost it oneself, that one never had anything valuable to lose, or that no one can be held responsible for the loss. Moreover, by framing the loss in economic terms, reparations proponents also emphasize that the loss had economic implications.

But there are difficulties to adopting reparations as a strategy. Any minority group that devotes itself to educating a majority risks ignoring its own need to forge a positive agenda. When the cost of educating a majority is born primarily by the minority, valuable resources needed by communities are diverted away from work toward practical solutions that only they can devise. An “education” approach depends upon the assumption that the education will “take” and that once educated, newly informed Americans will react appropriately. But if all education brings is simply confession and no acts toward restoration, then the time devoted to education is a hefty price to pay for a community with scarce resources and little time. Far from moving

---

<sup>22</sup> This ability shapes what Richard Delgado has, in defense of the critical race theory narrative tradition, called the “dominant narrative,” or “the body of received wisdoms that pass as truth but actually are contingent [and] power-serving.” Richard Delgado, *Rodrigo’s Final Chronicle: Cultural Power, the Law Reviews, and the Attack on Narrative Jurisprudence*, 68 S. CAL. L. REV. 545, 549 (1995).

<sup>23</sup> See FLAGG, *supra* note 5.

<sup>24</sup> See Cook, *supra*, text accompanying notes 50-52.

of 'conspiracy' has long reached coconspirators and aiders and abettors who did not commit the criminal act itself but who participated in its planning or gave comfort or assistance to the perpetrator in the aftermath.<sup>38</sup>

Equitable theories of unjust enrichment as applied to otherwise innocent parties also support the view that a victim may find his justice from one who did not perpetrate the original bad act but now benefits from it.<sup>39</sup> The "constructive trust" doctrine is sometimes used to prevent heirs, beneficiaries, and other persons, though innocent, from benefiting from improper conduct that deprived a third party of property that was later transferred to them.<sup>40</sup> And indeed, given that the offending action was specifically designed to impose both a racial group benefit and a racial group detriment, one can reasonably wonder why should the remedy also not be so designed.

It is true that black reparations present its own unique set of conceptual difficulties, all of which cannot be addressed here. The essential point is that America has demonstrated that it can and will carve out exceptions to its ordinary conceptions of entitlement and individual responsibility when it perceives such a broadening of responsibility to be in the majority's interest—or

---

has been obtained in any manner constituting theft or extortion, or who assists in concealing, selling or withholding said property from its rightful owner). Other states similarly define the crime. See, e.g., LA. REV. STAT. ANN. § 14:69(A) (2001); MICH. COMP. LAWS § 750.535(1) (2000); N.Y. PENAL LAW § 165.50 (McKinney 1999). See also MODEL PENAL CODE § 223.6(2) (1980) (presuming person's knowledge of the stolen nature of property in certain circumstances).

<sup>38</sup> See, e.g., MODEL PENAL CODE § 5.03 (1980). Compare MINN. STAT. § 609.229 (West Supp. 2001) (defining as a separate offense crimes "for the benefit of" a criminal gang, though the actors are not themselves gang members).

<sup>39</sup> The theory of unjust enrichment in general has been suggested as a basis for reparations. See, e.g., Davis, *supra* note 1.

<sup>40</sup> *Smithberg v. Illinois Mun. Ret. Fund*, 735 N.E.2d 560 (Ill. 2000) involved a husband's court-approved divorce settlement agreement to name his first wife beneficiary of a pension in exchange for her giving up rights to his other retirement benefits. Instead, after remarriage, he designated his second wife as the beneficiary. See *id.* at 562. After his death, the court, stating that "wrongdoing is not always a necessary element" of the constructive trust doctrine, imposed a constructive trust upon the benefits, and ruled that the second wife, although innocent, was not entitled to receive the benefits. See *id.* at 566. In *Troy v. Hart*, 697 A.2d 113 (Md. Ct. Spec. App. 1997), a Medicaid recipient who would have become ineligible for Medicaid assistance had he received his inheritance, disclaimed that inheritance and allowed his share to pass to his sisters. The court held that the sisters took as "constructive trustees," subject to Medicaid's claim for reimbursement. See *id.* at 119. While one sister was involved in securing her brother's disclaimer, the other was not. See *id.* at 115. See also *Lackey v. Lackey*, 691 So. 2d 990, 995 (Miss. 1997) (imposing a constructive trust on the proceeds of an insurance policy purchased with stolen trust funds); *Pope v. Garrett*, 211 S.W.2d 559 (Tex. 1948) (imposing a constructive trust upon heirs innocent of preventing execution of a revised will); RESTATEMENT OF RESTITUTION, § 160 ("Where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it, a constructive trust arises.") See also *id.* cmt. c and example therein. According to comment e, "Where property is held by one person upon a constructive trust for another, and the former transfers the property to a third person who is not a bona fide purchaser, the interest of the beneficiary is not cut off. In such a case he can maintain a suit in equity to recover the property from the third person, at least if his remedies at law are not adequate." See *id.* cmt. e (internal citation omitted). A few jurisdictions allow recovery even against good faith purchasers for value. See, e.g., COL. REV. STAT. § 18-4-405 (1999) (requiring that a person deprived of property by theft, robbery or burglary to be restored and to maintain an action against the wrongdoer or any possessor of the property including a good faith purchaser for value).

at least not significantly to the majority's detriment.<sup>41</sup> The problem then is not that America lacks any theoretical precedent for dealing with the reparations question. The problem is that surrendering whiteness as property—and thus restoring human rights to blacks—would be extremely costly because whiteness has acquired such value. As Professor Cook notes, many in America still wish to believe that the victim caused his own injury and that the reason the victim cannot recover is because the victim has not worked hard enough or long enough.<sup>42</sup> At the heart of it, *many Americans have yet to fully reject the notion of white racial supremacy.*

To say that voluntary restoration is unlikely, then, is an understatement. No reconciliation can come without widespread white acceptance. And yet, widespread white acceptance is not likely to follow because emotional, political, and economic incentives operate directly against such acceptance.

### III. *Why Economic Reparations, even if Granted, Will not Lead to Reconciliation*

Finally, I have doubts that a reparations plan that focuses upon economic compensation is truly the way to reconciliation. It can be argued that Professor Cook's proposal avoids true confession by making reparations as painless as possible, relying upon corporate actions and anticipated economic rewards to accomplish it. Certainly, creating a win/win situation is not objectionable, but one can question whether a confession linked to economic reward is a true confession. I also question his assumptions about why corporations and investors would find the plan of value.<sup>43</sup>

Economic reparations-talk as a strategy also conceals a trap for the unwary. The mere agreement to couch one's injury in "economic" terms risks significantly minimizing black injury, and as Professor Cook recognizes, race discrimination and class discrimination are not the same.

Consider, for example, the meaning of 'wages.' What does it mean to speak of wages for a slave? Giving the slave the minimum wage that could have been earned by a free white man plus interest does not compensate the slave because the slave could never have purchased racial equality with that wage. Thus, the harm done to the slave was not the mere denial of a wage. It was also the deprivation of the right to travel toward a better economic existence or to educate oneself and improve one's skills, the inability to control and exploit the fruit of one's own hands, the inability to protect one's family from harm and to cooperate openly with one's own family and community to collaborate towards economic progress, the lack of the choice to escape poverty by the sweat of the brow, and most importantly, I believe, the inability to pass the benefits of these efforts to one's own black children in the same way that whites have passed the fruits of their own hard work—as well as their

---

<sup>41</sup> Of course, this is consistent with Derrick Bell's famous article on interest convergence. See Derrick Bell, *Brown versus Board and the Interest Convergence Dilemma*, 93 HARV. L. REV. 518 (1979).

<sup>42</sup> See Cook, *supra*, Part I.A.

<sup>43</sup> He concedes of course that such taxes might be passed on to consumers. This fact raises an interesting scenario in which blacks might end up paying in part for their own reparations.

unjust enrichment from black work—on to their white children. By contrast, the poor white man was still white and could adopt the mores of the rich to conceal his economic status, and thus avoid class discrimination.

Blacks' economic dilemma flows directly from such injuries. Would modest payments to living blacks today, or a scheme to provide economic support such as that Professor Cook proposes, remedy these injuries? I think not. As he acknowledges, in a world where whiteness remains property, the black dollar will still purchase less than the white dollar. Thus, any act of reparations that does not include a calculation of the value of whiteness (or of the detriment caused by the devaluation of blackness) will fall far short of the compensatory mark.<sup>44</sup>

Another concern is that political reparations almost certainly suggest horse-trading that will require a surrender of claims considered noncompensable. One can expect this outcome, given that blacks do not control either Congress or state legislatures. In that event, the failure of reparations to heal will be greater still. Blacks cannot possibly agree to go quietly into the night having received only a token allocation while the race-as-property regime continues to multiply their economic woes. Whether or not others find their claims cognizable, one can reasonably take the position that unquantifiable claims of race-based injury are an important part of black history that should never be bartered away for a short-term economic gain that does not remedy the root causes of black economic woes.

Agreements to shoehorn black claims into traditional conceptions of injury that are based upon a free white person's life or to surrender the more significant part of black claims also surrender the opportunity to find true reconciliation and true restoration through a transformation of the very structures that support and are supported by the oppression. The very affirmation that Professor Cook argues is central to confession and to forgiveness is therefore lost because the dominant culture's language is historically racially exclusive and does even acknowledge the injury inflicted. That the culture has only words for claims or injuries that a free white person might also possess or endure is not accidental—the limitation in language is a product of the oppression itself.

Professor Saul Levmore has suggested that African American claims "may simply be too numerous and overwhelming to be granted," while Japanese American war claims were sufficiently small and unlikely to attract broad opposition from interest groups.<sup>45</sup> It is fair to say that the primary hurdle to black reparations is not the tremendous harm that oppression did to blacks, but the tremendous benefits it bestowed and continues to bestow upon whites. The key 'interest group,' then, is whites themselves and the key interest is in whiteness as property. Surely, that interest may be represented in the political sphere by interest groups that have names couching the interest differently, but ultimately we come down to retaining whiteness as prop-

---

<sup>44</sup> See, e.g., Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1710 (1993) (discussing how in earlier days light skinned blacks tried to pass as whites and thereby collect the economic benefits of being white). See also *supra* note 5.

<sup>45</sup> Levmore, *supra* note 5, at 1688.

erty—retaining unjust enrichment from black subjugation. Unless those benefits are surrendered and the value of black life is restored, there will never be reconciliation. Black upward mobility will likely still come through Herculean efforts of blacks and others who truly desire to achieve the beloved community, but there will be no widespread reconciliation between blacks and whites.

Finally, it may even be that compensation is the wrong formula for reconciliation. The right formula may be the divestiture of unjust gains. Indeed, if all of the spoils of slavery and race discrimination—all of the unjust enrichment—could be cast into the sea so that neither living whites nor living blacks would have access to them, I, and I think many blacks, would be quite satisfied to rely upon our talents in a level playing field. For this writer, the road to reconciliation is divestiture, not compensation.

True reparations, then, must move the culture to create a new legal vocabulary, one that eschews the idea of race as property. It must question legal and social models that are built upon assumptions of race as a legitimate property right. Moreover, any true black reparations plan must not shy away from the use of the terms “white” and “black,” the artificial conceptions that put us in this difficult situation. Such terms are essential to an accurate description of the history that brought us here, they remain relevant to our present condition, though less so than before, and ignoring them does not will the reality of racial preference into nonexistence.

I do not think that Professor Cook would disagree with much of what I have said here. I suspect that he and other political reparations advocates hope that an infusion of support to black families (as members of an historically economically disadvantaged group) will jumpstart an economic revival in black America that would build and become self-perpetuating. This view is understandable given the dire economic straits that some black families face. Also behind reparations claims may be a recognition that, generally speaking, those with money get better service and better justice. Perhaps the hope is that these results will flow forth for black America too. But absent measures to reduce the value of whiteness as property, the post-reparations black dollar will still buy only a fraction of what the post-reparations white dollar will buy. The white dollar will still be spent in white neighborhoods, not in black ones. And, black life will still be worth less than white life. The problems that lie at the heart of economic downturns in black communities will remain.

#### *IV. True Reparations*

I am clearly on the easier side of this discussion. Professor Cook has had the formidable job of constructing a reparations plan that is consistent with King’s vision of the beloved community. I have had the privilege of critiquing and complimenting it from afar. Having considered the matter of reparations at his invitation, I find myself substantially agreeing with those who

argue that the reparations debate has some value despite its unlikelihood of success.<sup>46</sup>

But I also will not join in this call precisely because I see no chance of success. I cannot help thinking that economic reparations advocates are engaging in a task sometimes referred to as 'spitting into the wind.' There are those who believe that if one continues to spit into the wind, the spit will eventually hit its intended target. In my experience, the spit inevitably, repeatedly rebounds onto an unintended one. Maybe the hope is that one will catch the wind in a moment of weakness. If so, success will only be momentary. Maybe the theory is that the wind simply needs to be reminded that truth offers some resistance, be it ever so humble, against the wind's great power. Perhaps one has swallowed so much that one simply needs to clear one's throat every now and again, regardless of the unpleasant consequences.

But spitting into the wind bears its consequences for victims. Without an occasional victory, victims get tired; they lose hope; they grow angry. The wind has no heart, no feeling. The more one spits into the wind without success, the more one is tempted to become like the wind.

I am convinced that, in the present state of affairs, while the dire economic conditions that some black communities face did not occur at our own hands, restoration must continue to occur largely by our own hands. This is not a pessimistic view but a realistic one. We can, in that effort, happily accept the support of whites who believe in the beloved community, but as I scan the landscape of black needs, our need to restore our right to collaborative efforts with each other is key.

In human terms, what was lost in slavery and in discrimination against blacks was not merely a black loss, but a larger community loss. True reparations must repair that community. We must begin to see as reparations work the efforts of attorneys, legal scholars, politicians, activists, or even teachers, doctors, architects and stockbrokers, who make crossing racial divides and remedying racial injustice even a small part of their work. Those who do this work are casting the spoils of slavery and racism into the sea. With each inroad, in law, in societal norms, and in daily public discourse, the value of race as property is diminished. This is essential work, for if it is not done, the continued insistence on whiteness as property will necessarily require the establishment of blackness as property. That may, in fact, be where we are headed, but we will never have reconciliation—or King's beloved community—until rights in racial property have been both acknowledged by all and surrendered by all.

---

<sup>46</sup> Compare Westley, *supra* note 1, at 435 (arguing that because the debate has intellectual benefit, "[r]eparations are worth fighting for even if such a campaign is unlikely to be successful").